Audrey Karen Barry v Datuk Dr Yee Moh Chai

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)–20 OF 2008(S)
ALAUDDIN PCA, ARIFIN CJ (MALAYA) AND NIK HASHIM FCJ
17 APRIL 2009

Election — Petition — Allegation of corrupt practice — Whether established — Whether election of respondent nullified — Election Offences Act 1954 ss 11(1)(c), 32(a), (b), (c)

Evidence — Burden of proof — Person who alleged fact had to prove it — Whether onus upon appellant to establish prima facie case before respondent required to answer

The appellant was a registered voter in the State Constituency of Api-Api in Sabah ('the state constituency'). The respondent was declared a winner in the state constituency in a general election held on 8 March 2008. The appellant sought to declare that the election of the first respondent as void pursuant to s 32(a) and/or (b) or (c) of the Election Offences Act 1954 ('the Act'). Alternatively, the appellant sought the declaration that Liew Chin Jin, who lost to the respondent, as being duly returned or elected in the state constituency. The appellant alleged that the respondent and/or his agent with his knowledge and consent had during the campaigning period, printed, published and caused to be distributed the pamphlets in Chinese language for the purpose of intimidating, soliciting and persuading voters not to vote Liew Chin Jin for the state constituency. The pamphlets however, did not contain the names and addresses of its printer and publisher which in accordance to s 11(1)(c) of the Act was a corrupt practice. The appellant argued, inter alia, (i) that the learned election judge had misdirected himself for failing to appreciate the overwhelming circumstantial evidence that the agents of the respondent were responsible for distributing the pamphlets; (ii) that the evidential burden of proof shifted to the respondent after the existence of one of the respondent's agent 'Ah Seng' had been established by the appellant; (iii) that based on the evidence of Alexander Wong Min Vui ('PW2') that Ah Seng on 6 March 2008 was in a hotel, Airport View Hotel, responsible for the distribution of the pamphlets. The appellant further contended that the evidence that Ah Seng was the respondent's agent was supported by the election expenses statement which listed Ah Seng as one of the workers paid by the respondent. The learned election judge decided that the burden to

show that Ah Seng was not the respondent's agent could not be imposed on the respondent until the appellant had established with sufficient certainty as to the real identity of Ah Seng.

Held, dismissing the appeal:

(1) The learned election judge was in a better position to assess the credibility of witnesses after having seen and heard them. As such, the learned election judge's decision that there were serious contradictions and inconsistencies in PW2's evidence was meticulously done, and hence, there was no necessity to further engage in detailed analysis of the evidence (see para 23).

(2) It is trite law that the appellant must establish a prima facie case before the respondent was required to answer in line with s 103 of the Evidence Act 1950. It was for the appellant to prove the identity of Ah Seng and that he was the agent of the respondent. However, the appellant had failed to prove it and on that premise the learned judge had rightly dismissed the appellant's petition (see para 25).

[Bahasa Malaysia summary

Perayu adalah pengundi berdaftar di Kawasan Api-Api di Sabah ('kawasan'). Responden diisytiharkan pemenang di kawasan tersebut di dalam pilihan raya umum yang diadakan pada 8 Mac 2008. Perayu memohon untuk mengisytiharkan bahawa pemilihan responden pertama sebagai tidak sah berikutan s 32(a) dan/atau (b) atau (c) Akta Kesalahan Pilihan Raya 1954 ('Akta'). Secara alternatif, perayu memohon perisytiharan bahawa Liew Chin Jin, yang kalah kepada responden sebagai dilapor pilih atau dipilih di dalam kawasan tersebut. Perayu mendakwa bahawa responden dan/atau agennya dengan pengetahuan dan izin telah semasa tempoh berkempen, mencetak, menerbitkan dan menyebabkan risalah dalam bahasa Cina diagihkan bagi tujuan untuk menakut-nakutkan, mendapatkan dan memujuk pengundi-pengundi untuk tidak mengundi Liew Chin Jin bagi kawasan tersebut. Walau bagaimanapun, risalah tersebut tidak mengandungi nama dan alamat pencetak dan penerbitnya yang mana mengikut s 11(1)(c) Akta adalah amalan korup. Perayu berhujah, antara lain, (i) bahawa hakim pilihan raya yang bijaksana telah tersalah arah dirinya kerana gagal untuk menerima keterangan ikut keadaan yang jelas bahawa agen responden yang bertanggungjawab mengagihkan risalah tersebut; (ii) bahawa beban pembuktian yang jelas beralih kepada responden selepas kewujudan salah seorang agen responden 'Ah Seng' telah dibuktikan oleh perayu; (iii) bahawa berdasarkan keterangan Alexander Wong Min Vui ('PW2') bahawa Ah Seng pada 6 Mac 2008 berada di hotel, Airport View Hotel, bertanggungjawab

untuk pengagihan risalah tersebut. Perayu selanjutnya berhujah bahawa keterangan bahawa Ah Seng adalah agen responden disokong oleh pernyataan pembelanjaan pilihan raya yang menyenaraikan Ah Seng sebagai salah seorang daripada pekerja yang dibayar oleh responden. Hakim pilihan raya yang bijaksana memutuskan bahawa beban untuk menunjukkan bahawa Ah Seng bukan agen responden tidak dapat dikenakan ke atas responden sehingga perayu membuktikan dengan kepastian yang memadai mengenai identiti sebenar Ah Seng.

Diputuskan, menolak rayuan:

(1) Hakim pilihan raya yang bijaksana berada dalam kedudukan yang lebih baik untuk menilai kredibiliti saksi-saksi selepas melihat dan mendengar keterangan mereka. Oleh itu, keputusan hakim pilihan raya yang bijaksana bahawa terdapat penyanggahan dan ketidaktekalan yang serius di dalam keterangan PW2 dibuat secara teliti, dan oleh itu, tidak perlu untuk selanjutnya membuat analisa keterangan secara terperinci (lihat perenggan 23).

(2) Adalah undang-undang yang nyata bahawa perayu mesti membuktikan kes prima facie sebelum responden dikehendaki untuk menjawab mengikut s 103 Akta Keterangan 1950. Perayu mesti membuktikan identiti Ah Seng dan bahawa dia adalah agen responden. Walau bagaimanapun, perayu gagal untuk membuktikannya dan atas dasar tersebut hakim yang bijaksana secara betul telah menolak petisyen perayu (lihat perenggan 25).]

Notes

For cases on allegation of corrupt practice, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1992–2000.

For cases on person who alleged fact had to prove it, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 531–533.

Cases referred to

Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd (formerly known as Intradagang Merchant Bankers (M) Bhd, as trustee, manager and agent) [2005] 3 MLJ 140, CA (refd)

Ali Amberan v Tunku Abdullah [1970] 2 MLJ 15, HC (refd)

Chong Sooi Chuen v Yuen Lai Chun [1988] 2 MLJ 443, SC (refd)

Hii Soo Chiong v Board of Management Yee Ting Primary School [1973] 2 MLJ 204, FC (refd)

Wong Sing Nang v Tiong Thai King [1996] 4 MLJ 261, HC (refd)

Legislation referred to

Election Offences Act 1954 ss 11(1)(c), 32(a), (b), (c)
Evidence Act 1950 s 103

Appeal from: Election Petition No K26–04 of 2008

Chan Chin Tang (Ansari Abdullah and Erueana Ansari with him) (Ansari & Co) for the appellant.
Raymond Szetu Mei Thong (Baldev Singh with him) (Baldev Gan & Associates) for the respondent.

Arifin Zakaria CJ (Malaya):

BACKGROUND

[1] On 13 March 2009 by a unanimous decision we dismissed this appeal and we now give our reasons.

[2] The appellant in this appeal is a registered voter in the State Constituency, N 15, Api-Api in the State of Sabah. The candidates for the said constituency in the general election held on 8 March 2008, were Ms Liew Chin Jin (also known as Ms Christina) and Datuk Dr Yee Moh Chai ('the respondent'). At the election, Ms Liew Chin Jin polled 3,245 votes against the respondent who polled 3,419 votes. The respondent was declared the winner of the election by a narrow margin of 174 votes.

[3] The appellant in his petition sought to declare the election of the first respondent as void pursuant to s 32(a) and/or (b) or (c) of the Election Offences Act 1954 ('the Act'). In the alternative the appellant sought the declaration that Ms Liew Chin Jin as being duly returned or elected.

[4] The petition was grounded on the allegation that the respondent and/or his agent with his knowledge and consent had during the campaign period, printed, published and caused to be distributed in the State Constituency, N 15, Api-Api and the Parliamentary Constituency P 172, Kota Kinabalu, pamphlets in Chinese Language with reference to the election for the purpose of intimidating, soliciting and persuading voters in the State and Parliamentary Constituencies to refrain from voting Ms Liew Chin Jin. The pamphlets do not carry the name and address of their printer and publisher. One of the pamphlets was tendered and marked as exh P1. It carries the picture of Ms Liew Chin Jin and Dato' Seri Anwar Ibrahim. Exhibit P1(T), the official certified translation of the pamphlet reads as follows:

(i) Terrible! Prevented funding to Chinese Schools while in power;

(ii) While in power he (Datuk Seri Anwar Ibrahim) appointed non-Chinese speaking administrator to Chinese Primary Schools;

(iii) Misled children into public demonstration ...

(iv) Do you want foreign culture here?

(v) Even members of the public were not spared ...

(vi) Arson is what they are good at.

(vii) PKR's culture of street demonstration = riot + panic + unrest.

Do you want this?

[5] It is not in dispute that exh P1 does not bear the name and the address of its publisher and printer. Under s 11(1)(c) of the Act it is a corrupt practice for any person to print, publish, distribute or post up or causes to be printed, published, distributed or posted up any advertisement, handbill, placard or poster which refers to any election and which does not bear upon its face the name and address of its printer and publisher. If found guilty of such an act the person is liable to imprisonment for a term not exceeding one year and to a fine not exceeding two thousand ringgit. Therefore, the act of corrupt practice under s 11(1)(c) is an offence under the Act. Further s 32(c) of the Act provides that the election of a candidate at any election shall be declared void on an election petition on the ground that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate. Hence an allegation of corrupt practice if proved carries with it not only the penal consequence but could also lead to the avoidance of the election.

CONTENTIONS OF PARTIES

[6] Learned counsel for the appellant submitted that the learned election judge had misdirected himself as he had failed to appreciate the overwhelming circumstantial evidence which leads to the inevitable conclusion, that it was the agents of the respondent who were responsible for distributing exh P1.

[7] He also contended that the respondent in an election case and especially so on matters within his special knowledge, is under a duty to assist the court to adduce evidence to enable the court to have the full facts of the case. In other words the evidential burden of proof shifted to the respondent after the petitioner/appellant had established the existence of 'Ah Seng'.

[8] He submitted that during the trial, the respondent did not challenge the fact of the existence of 'Ah Seng' and that the latter was working for the respondent during the election.

[9] Relying on P20 (written election expenses) he contended it clearly shows that 'Ah Seng' was the worker of the respondent and Alex (PW2) was dealing with the latter. He said that on the circumstantial evidence, 'Ah Seng' was, on the day in question at the Airport View Hotel, and the pamphlets came from there. It is submitted for the petitioner that the testimonies of the witnesses and the documentary evidence adduced had proven beyond reasonable doubt that the agents of the respondent were responsible for the distribution of the pamphlets

[10] Learned counsel for the respondent in his rebuttal submitted that the burden of proof lies on both parties He said the appellant cannot presume that the respondent has special knowledge of the existence of 'Ah Seng'. The burden is not on the respondent to show that 'Ah Seng' was not his agent, he said the true identity of 'Ah Seng' was not even proven on a balance of probability. He further said that on the totality of the evidence, the appellant failed to prove that the respondent's agent had distributed the pamphlets. In this case the name 'Ah Seng' did appear in P20 but without further evidence it is difficult to determine who this 'Ah Seng' was.

EVIDENCE BEFORE THE COURT

[11] Let us now consider the relevant evidence before the court. The appellant's case is largely based on the evidence of Alexander Wong Min Vui (PW2). According to him, he worked for one 'Ah Seng' whom he claimed was the agent of the respondent. As a matter of fact the only link between the pamphlets and the respondent is through 'Ah Seng'. If indeed it is proven that 'Ah Seng' was the agent of the respondent then the respondent would be in breach of s 11(1)(c) of the Act. In this regard it is therefore essential for the appellant to prove that 'Ah Seng' was the agent of the respondent.

[12] In his testimony PW2 stated that the first time he saw exh P1 was at the 5th Floor of the Airport View Hotel on the 6 March 2008. He said a person whom he referred to as 'Boss' asked him and others to distribute the pamphlets (exh P1). He said 'Boss' here refers to 'Ah Seng'.

[13] PW2 further testified that he went to Airport View Hotel twice and on each occasion he met RW6 (Chin Tek Ming). But prior to this meeting he did not know Chin Tek Ming; he was only informed about him by his friends. However on both occasions PW2 said he never spoke to Chin Tek Ming. But at the 5th floor Airport View Hotel he saw Chin Tek Ming

directing the distribution of boxes which PW2 alleged contained the pamphlets, exh P1. PW2 said he and the others were given a list of places to distribute the pamphlets He was not sure why Chin Tek Ming had asked him to distribute the pamphlets but he said that day his job was to direct the people to go to work (distributing the pamphlets). He said he was part of the team leader in the distribution of the pamphlets and that under him there were almost 200 workers to distribute the pamphlets.

[14] PW2 also said that he met 'Ah Seng' at Airport View Hotel at 5.30pm on 6 March 2008. At the hotel he saw Chin Tek Ming at the ground floor. He said he collected the pamphlets for distribution at 9.30pm. They left Airport View Hotel at about 9.30pm that night and his group went to Petronas Luyang to assemble. From there he directed the others to go to their respective designated places to distribute the pamphlets. At about 10.30pm the same night, he said he received a phone call from his friend by the name of 'Neal' that the latter was arrested at Foh Sang, Luyang. PW2 then rushed to the scene and at the scene he saw police personnel, PW1, Ms Christina Liew and Mr Foo, among others.

[15] PW2 said he told the police that he was directed by 'Ah Seng' to distribute the pamphlets, exh P1 and they were paid by 'Ah Seng' to distribute the pamphlets throughout Kota Kinabalu.

[16] Learned counsel for the appellant in his submission contended that the evidence that 'Ah Seng' was the agent of the respondent is supported by the election expenses statement (P20) which listed 'Ah Seng' as one of the workers that were paid by the respondent.

[17] It is not in dispute that the name 'Ah Seng' appears in exh P20. The respondent (RW7) testified that he did not know when the workers were paid or when they worked. Since the name appears on the list he presumed 'Ah Seng' was one of the party workers. But he maintained that he did not know 'Ah Seng'.

[18] The respondent also told the court that he did not prepare P20, though it relates to his election for the State Constituency N 15, Api-Api. He said that it was prepared by his election agent Danny Tham, though he admitted that he signed P20.

[19] Then we have the evidence of Chin Tek Ming (RW6). He denied meeting PW2 at Airport View Hotel on the night of 6 March 2008 and he also denied that he had given him instruction to distribute the pamphlets. He testified that early that evening he was at Kopongit attending a party meeting

and arrived at Airport View Hotel after the meeting around 8.40pm. After dinner he said he stayed on at the hotel until around 12 midnight before going home.

[20] His evidence was supported by the evidence of Asriyani Summase (RW5) who arrived at the meeting around 6pm on 6 March 2008 and left at around 7pm. She testified that at the meeting at Kopongit she saw RW6 and two other party members.

[21] Based on the evidence before him the learned judge came to his finding that the appellant failed to prove that the pamphlets were distributed or deemed to have been distributed by the agents of the respondent. The learned judge stated in his judgment that the appellant failed to establish the identity of 'Ah Seng' who was the link between the respondent and PW2. This is what he said:

> On the evidence in this case, I am of the view that it is impossible to establish the true identity of 'Ah Seng' as described by PW2. Besides the evidence of PW2 as to the identity of 'Ah Seng', there is no other evidence forthcoming from the other petitioner's witnesses as to the identity of 'Ah Seng'. At this juncture I may say that the burden is on the petitioner to establish with certainty who is this 'Ah Seng' whom the petitioner claimed to be working for and known by the first respondent. It must be remembered that the petitioner had resisted the first respondent's application for further and better particulars earlier in this proceedings as to the person or persons claimed by the petitioner to be involved as agent or agents of the first respondent on the ground that any premature disclosure of their identities would compromise their personal safety and that this person or persons would be produced to testify and that their identities would be known at the trial. Unfortunately no evidence is forthcoming from the petitioner or any of the petitioner's witnesses on this matter.
>
> Learned counsel for the petitioner submitted that the burden is on the first respondent to show that 'Ah Seng' was not his agent since it is within the first respondent personal knowledge. I think no such burden can be imposed on the first respondent until the petitioner had established with sufficient certainty as to the real identity of 'Ah Seng' referred to in the petition. To do otherwise would be to ask the first respondent to shoot in the dark.
>
> Therefore it is my finding that the petitioner had failed to establish and prove the true identity of 'Ah Seng' referred to in the petition and thus has not discharged the burden of prove (sic), even on the balance of probability, that 'Ah Seng' is someone known to the first respondent and had, in the last election, worked and acted as the first respondent's agent for the purpose of the election campaign in the distribution of the pamphlets. Further, I accept the submissions by the first respondent's counsel that the evidence of RW9 explaining who the persons in the list at folio 15–5–2 of exh P20 were, and the circumstances in which they were employed, should put to rest any suggestion that the 'Ah Seng' in the list is in anyway connected to the 'Ah Seng' referred to in the petition.

[22] On the credibility of PW2 the learned judge observed at p 27 of his judgment:

> Is PW2 telling the truth? In my assessment, PW2's evidence is full of contradictions and must be suspected.

Further down he continued:

> PW2 deliberately avoided the questions asked of him by giving answers that are very general and very hard to justify in the circumstances.

[23] The basis on which he came to the above conclusion is well set out in his judgment at pp 30, 35, 36, 37 and 38. In short the learned judge stated that there were serious contradictions and inconsistencies in PW2's evidence which undermine his credibility. As often been said when the findings of the trial judge are of pure facts, based on the credibility of the witnesses, the appellate court will not as a general rule interfere with such findings. The trial judge is in a better position to assess the credibility of witnesses after having seen and heard them (see *Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd (formerly known as Intradagang Merchant Bankers (M) Bhd) as trustee, manager and agent* [2005] 3 MLJ 140, *Hii Soo Chiong v Board of Management Yee Ting Primary School* [1973] 2 MLJ 204 (FC) and *Chong Sooi Chuen v Yuen Lai Chun* [1988] 2 MLJ 443 (SC).) We do not propose to engage in detail analysis of the evidence as this was meticulously done by the learned judge and we find that his findings are fully supported by the evidence before him.

BURDEN AND STANDARD OF PROOF

[24] Moving to the next pertinent issue canvassed before us that is the question of the burden and standard of proof required in a case of this nature. It is settled law that it is for the appellant/petitioner to establish a prima facie case before the respondent is required to answer. This is clearly expressed in the judgment of Raja Azlan Shah J (as His Highness then was) in the case of *Ali Amberan v Tunku Abdullah* [1970] 2 MLJ 15 (HC), at p 17 said as follows:

> Now an allegation of corrupt practice is of a quasi-criminal nature in as much as a finding of corrupt practice entails penal consequences. The onus is on the petitioner to prove it beyond reasonable doubt by evidence which is clear and unambiguous.

And in the case of *Wong Sing Nang v Tiong Thai King* [1996] 4 MLJ 261, the learned election judge in Sibu held as follows:

> I have no hesitation in agreeing with counsel for the petitioner that if an act forbidden by statute were done, the court is allowed to draw from it the ordinary inference prima facie that it was done for a corrupt purpose. However, I am of the view that before such inference can be drawn there must be clear and unequivocal evidence before the court to prove the allegation, bearing in mind that the burden of proving beyond reasonable doubt is on the petitioner.

[25] This is in line with s 103 of the Evidence Act 1950 which reads:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In short it is for the appellant to prove who this so called 'Ah Seng' was and that he was the agent of the respondent. This the appellant failed to prove and on that premise the learned judge had rightly dismissed the petition.

[26] For the above reasons we dismissed this appeal with costs. Deposit to be paid to the respondent to account of taxed costs.

Appeal dismissed with costs.

Reported by Mashrifah Ravendran